A contested case hearing was held in (city), Texas, on December 20, 1991, with (hearing officer) presiding as hearing officer. The sole disputed issue was whether appellant (claimant below) sustained a compensable injury on (date of injury), said date being the date claimant knew her injury may have been related to her employment. Claimant's employment had terminated on April 30, 1991. The hearing officer determined that claimant, who represented herself at the hearing, was not injured in the course and scope of her employment on (date of injury), and, was not entitled to benefits under the Texas Workers' Compensation Act, TEX. REV. CIV. STAT. ANN. arts 8308-1.01 *et seq* (Vernon Supp. 1992) (1989 Act). Claimant has requested our review of that decision contending that the hearing officer's decision was grounded on the fact that claimant was not an employee on (date of injury), the date she discovered her injury. She contends she was advised to designate (date of injury), as the date of her injury by an employee of the Texas Workers' Compensation Commission (Commission) and that her reliance upon that advice has resulted in the denial of her workers' compensation benefits.

DECISION

We affirm the decision of the hearing officer. The evidence is factually sufficient to support his findings of fact, conclusions of law, and his determination that claimant is not due benefits under the 1989 Act.

Though neither mentioned in the hearing officer's decision nor marked by him as an exhibit for the benefit of subsequent reviewers, the Benefit Review Conference Report, accompanied by a statement of the "disputed issue," were designated as Hearing Officer Exhibits 2 and 3, became a part of the record, and may be considered on this appeal. Article 8308-6.42(a) (1989 Act). According to these exhibits, claimant's position at the Benefit Review Conference (BRC) was that her "condition" had been previously diagnosed as arthritis or tendonitis and that claimant didn't know it was a "work related condition" until (Dr. Z) diagnosed "carpal tunnel syndrome [CTS] on (date of injury)." Carrier's position at the BRC was stated as being that no injury occurred on (date of injury); that any injury claimant sustained was due to an injury in 1985 for which the carrier didn't provide coverage; and, that claimant's job duties had not required repetitive motion. The Benefits Review Officer (BRO) commented that claimant appeared to have correctly reported her injury date pursuant to Article 8308-4.14 (1989 Act) which provides that "the date of injury in the case of an occupational disease is the date on which the employee knew or should have known that the disease may be related to the employment." The BRO went on to observe that Dr. Z's reports appeared to support claimant's position "relating to the CTS" and that she "appeared to have sustained a repetitive trauma injury for which benefits are due." This officer also denied carrier's request for another BRC with the carrier who provided coverage in 1985 because "there has been no claim for a 1985 injury." Hearing Officer's Exhibit 3, the statement of the disputed issue, stated the issue unresolved after the BRC as: "whether or not the claimant sustained a compensable injury on 5/16/91 or if the claimant's condition is a result of a prior injury."

At the hearing the parties did not contest nor raise disputed issues concerning the discovery date of claimant's CTS, that is, (date of injury), the timeliness of claimant's notice of injury to her employer, nor coverage by carrier of an occupational disease not discovered until after claimant's employment was terminated. The parties agreed that the sole issue of the hearing was whether or not claimant sustained a compensable injury on (date of injury). Claimant's theory and evidence was to the effect that her CTS condition, while not diagnosed until (date of injury), after her employment had terminated, had occurred over a

long period of time and was caused by her job-related injuries and employment duties. Carrier did not contest the timeliness of notice by claimant nor coverage in the event claimant was able to establish she sustained a compensable injury discovered on (date of injury). Carrier's evidence supported the position that claimant's medical condition was not caused by her employment.

In her written appeal, after noting she was not represented by counsel at the contested case hearing, claimant stated that "I was represented by and had the assistance of (Ombudsman)." She referred to "[T]the evidence presented in my behalf . . . ." She contended that "[M]y problem was that the Ombudsman who was assigned to protect and represent my interest, and who I also believe is an employee of the Texas Workers' Compensation Commission, suggested that my Notice of Injury should properly state that the date of injury was (date of injury), as that was the date then (sic) my recurrent condition was diagnosed by Dr. Z." The burden of claimant's appeal consists of the notion that it was the ombudsman who advised her to use the (date of injury), injury date, and, because she was no longer an employee on that date, the hearing officer determined claimant was not entitled to benefits. However, as previously discussed, the thrust of the evidence adduced by the parties at the hearing was whether or not claimant's CTS was job related. Carrier did not take the position at the hearing below, nor does it on appeal, that if claimant established her CTS was job related, carrier would nonetheless not be liable for benefits since claimant didn't discover it until (date of injury) and was by then no longer an employee. It is also clear from reading the entire "Final Decision and Order" of the hearing officer that he realized the respective positions of the parties concerning the disputed issue.

Claimant was not "represented" at the contested case hearing by the ombudsman employed by the Commission. The hearing record does not indicate that the ombudsman, who was present at the hearing, made any statement on claimant's behalf, introduced or opposed the introduction of any evidence, or in any other way participated in the hearing. The hearing officer discussed with claimant her right to have an attorney represent her at the hearing. However, claimant indicated she desired to proceed without representation by an attorney.

The 1989 Act established the Ombudsman Program to assist and provide information to injured employees and "otherwise assist unrepresented claimants, employers, and other parties to enable them to protect their rights in the workers' compensation system." Article 8308-5.41. However, the 1989 Act goes on in Article 8308-1.03(40) to define "representative" as meaning "a person, including an attorney, authorized by the Commission to assist or represent an employee, a person claiming death benefits, or an insurance carrier in a matter arising under this Act that relates to the payment of compensation." The 1989 Act also required the Commission to establish qualifications for "representatives" and to adopt rules establishing procedures for the authorization of such "representatives." Article 8309-2.09(e) (1989 Act). The Commission has adopted rules regarding the representation of parties before the agency and the requisite qualifications for such representatives. Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE, § 150.3 (TWCC Rules) authorizes as "representatives" licensed insurance adjusters, attorneys, or persons who file with the Commission a written power of attorney or written authorization from the claimant. The record does not establish that the local ombudsman functioned as a "representative" for claimant as that term is used in the 1989 Act and implementing rules.

According to the evidence, claimant had been employed by (employer) at its plant in (city), Texas, since August 8, 1977. Until December 1984, claimant had been a "mix

technician" whose duties involved the mixing of chemicals for use in the manufacturing of fiberglass. The performance of these duties included the lifting and pouring of containers of chemicals. From December 16, 1984, until her employment was terminated on April 30, 1991, claimant had been a "size supervisor" responsible for the correct performance of the chemicals mixing duties of three mix technicians. In April 1991, claimant's supervisory position was eliminated. She declined to accept an offer to return to her prior job as a mix technician and instead entered into a severance agreement effective April 30, 1991. Claimant has not worked since April 15, 1991.

Claimant's evidence revealed that sometime after she commenced employment in 1977, she reported four on-the-job accidents which were not "written up." One occurred in 1979 when two pipes fell on her wrists. The other three mishaps involved an acid spill on her leg, a fall with her right heel striking the floor, and a portable tank falling on her chest. There was no evidence as to the dates of these latter three occurrences. Other on-the-job accidents experienced by claimant, which apparently may have been "written up," as well as her visits to doctors, included the following: February 9, 1979--slipped on cleaning solution and hurt both shoulders and neck; 1983--fell on basement catwalk and hurt both wrists; August 1, 1983--visited doctor for pain in arms and hands (source not related); March 1985--visited doctor for back muscle spasm; December 10, 1985--fell at work on right side hurting right hip, knee, arm, elbow, shoulder, right hand, and both thumbs; June 15, 1986--visited doctor for pain in neck and right shoulder; July 6, 1989--visited doctor for stiff neck; January 9, 1990--visited doctor for pain in arms and told had "tendinitis and arthritis." Claimant never asserted claims for workers' compensation benefits for any of these mishaps. Her fall on December 10, 1985, was apparently the only job-related accident claimant experienced after becoming a supervisor in December 1984. Her employee's health insurance carrier paid her medical bills for that incident. The reason she adduced evidence at the hearing about her 1985 fall was because Dr. Z advised her in May 1991 that her CTS did not just develop in a day but over a period of time and she theorized that her prior injuries in the "size area," including her 1985 fall, probably caused her CTS and her arthritis.

In April 1991, when claimant decided to accept severance pay rather than return to mix technician duties (which she felt unable to perform), she discussed her problems with her "arms" with her employer's human resources officer who advised her about her post-termination coverage options including the fact that her health insurance coverage would continue for 45 days after her termination. Claimant was asked to visit the employer's doctor, (Dr. T). Claimant visited Dr. T on April 15, 1991, and related an extensive history concerning her right arm, shoulder and neck area dating back to 1983. Dr. T then told claimant he wanted to review her records from her personal physician, (Dr. A). Claimant returned to Dr. T on May 2, 1991, having terminated her employment effective April 30, 1991. Dr. T advised claimant that Dr. A's records revealed minimal to no evaluation of claimant's "chronic cervical problems" and suggested she seek further evaluation of her "chronic cervical pain" from a personal physician. By this time claimant had already made an appointment to see Dr. Z on May 15, 1991. According to Dr. Z's report, dated (date of injury), claimant complained of "pain in her neck, worse on the right side, radiating into the arm, also pain in both hands, in PIP's, MEP's, and wrist pain, pointing to the deQuervan's area and around elbow . . . ." Dr. Z's "assessment" included: (1) "degenerative arthritis possibly aggravated by work by extent of degenerative changes at wrists," and (2) "[CTS] probably secondary to #1 . . . ." (Emphasis supplied.)

It was this (date of injury), report of Dr. Z upon which claimant relied in asserting her

claim for workers' compensation benefits. However, she did not immediately assert that claim. According to the evidence, claimant decided against returning to her former duties as a "mix technician" and opted instead for a severance contract under which she was paid a lump sum of $22,440.00. According to the employer's safety manager, the normal amount of severance pay for claimant would have been one week's pay for each year of service or approximately $9,058.00. But because of "the times and out of compassion," the employer agreed to pay claimant two and one-half weeks of pay per year of service or $22,440.00. After her termination, the evidence showed that claimant filed a claim with the employer's group disability carrier and received at least twenty payments. A claimant's application for such benefits required claimant to check "yes" or "no" as to whether claimant is entitled to various benefits including workers' compensation.

The evidence also established that claimant filed a claim with the Texas Employment Commission (TEC) on May 5, 1991, for unemployment benefits. Claimant stated as the reason for her separation that the "cut back at work done away with our jobs." The employer didn't contest this claim because it felt that claimant could still work. The hearing officer took "judicial (sic) notice" of the fact that the TEC requires an applicant for unemployment benefits to state that the applicant is able to work. Sometime before July 1991 claimant called (Mr. G), the employer's safety manager, to discuss her visit to doctors regarding her 1985 fall and her health problems. She wanted Mr. G to initiate a workers' compensation claim for her. She wrote him on July 22, 1991, in further regard to the matter. Mr. G testified that he investigated claimant's claim, as he does all such other claims, in his capacity as safety manager. He determined that after claimant's fall on December 10, 1985, she spent most of her time performing her supervisory duties which were not of a repetitious nature nor such as would cause damage or aggravate claimant's injuries from the 1985 fall. Claimant next wrote Mr. G a letter dated August 25, 1991, to again discuss the initiation of a workers' compensation claim. According to Mr. G, this was the employer's first "notice" that claimant was asserting a workers' compensation claim. As previously discussed, however, carrier raised no disputed issue concerning the timeliness of claimant's notice of injury after her discovery of same on (date of injury).

On August 16, 1991, claimant visited (Dr. M), a hand surgeon, giving a history of a fall in 1985 on her right shoulder followed by the symptoms for her right upper extremity which brought her to Dr. M. Dr. M noted claimant had degenerative arthritis in several areas including her neck and back, a lumbar radiculopathy at the L4-5 level, and CTS, worse on the left side. Dr. M's clinical impression was "bilateral posterior interosseous syndromes and bilateral CTS in addition to the neck and lower back findings . . . ." Dr. M felt claimant would benefit from operations on her wrists and forearms to release the posterior interosseous nerves and the median nerves of the carpal canals. He performed such surgery on her right arm on September 1, and on her left arm on November 14, 1991.

On August 23, 1991, claimant signed a form TWCC-41 (Employee's Notice of Injury Or Occupational Disease And Claim For Compensation) which asserted the nature of her injury as "[CTS]" affecting her "arms, back," and that she first knew the disease was work related on "5-16-91." According to claimant, (ombudsman), an ombudsman for the Commission, advised her to use the "5-16-91" date as the date of injury because that was the date Dr. Z diagnosed her CTS and indicated it may have been job related.

On September 25, 1991, claimant was evaluated by (Dr. S) at the request of carrier. She reported bilateral neck pain, lower back pain, and some relief in right arm since her surgery on September 3rd. She related her back problem to her fall in 1985. She reported

that her wrist problems began in 1983 and resolved with medication and after changing to a supervisory position. Dr. S's report contained the following opinion on the causation of claimant's CTS:

> **Causation:** The main question posed from the insurance carrier is whether her [CTS] is a result of her employment. During the past 8 years as a supervisor she has not had the kind of high repetition, high stress or vibratory work that is considered the cause of [CTS] in the industrial setting as a cumulative trauma. She did have one episode of presentation to the physician for wrist complaints even before her employment at (employer). No reports of problems with the repetitive work were made during the time that she worked as a mixer from 1978 until 1983. But, by the time that she changed to a size supervisor in 1984 she had had complaints of paresthesia in the right hand as per [Dr. Adams'] office notes. [CTS] is known to occur outside of the work place as often as it occurs in the work place. The question remains whether her cumulative injuries from 1978 to 1984 before going to supervisor may have been the causative agent in her [CTS]. If it were, the symptoms at that time were not apparently severe enough to warrant the patient complaining about them enough that a long course of corrective treatment was necessary for her to obtain relief. Could the subsequent period of less strain have relieved the [CTS], or would the condition remain the same without resolution? Clearly it did not become more symptomatic during the period of her work as a supervisor. She did not offer any significant complaints during that time.
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> In my opinion, about 50% of the cases of [CTS] are found to occur between the ages of 40 and 60 years of age. She fits into that age range. Although she may have had some complaints of [CTS] in 1983, this resolved with her changing jobs in 1984 to a supervisor. She may have had some residual underlying disease that remained that may have contributed in some way to her current complaints, but the argument would have to be stretched to support this.
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> Her underlying mild osteoarthritis seems to be the cause of her neck and lumbar pain and is probably not related to her work.

Carrier also adduced evidence tending to show that claimant's duties as a "size supervisor" were not of a repetitive nature such as would cause the CTS. Mr. G testified that claimant commenced her supervisory duties on December 16, 1984, and that such duties basically involved supervising three "mix technicians" in the mixing of batches of chemicals to meet the plant's fiberboard production requirements, scheduling the mixes, making data entries in the computer, and making the necessary related decisions. Carrier also introduced the report of (Mr. TS), an expert in occupational ergonomics, who performed an on-site study of the duties of a "size supervisor." He found that the job entailed the supervision and scheduling of mixes, preventive maintenance and quality control "walkthroughs," safety procedures, equipment inspections, record keeping, communicating with other departments, and helping the technicians as needed. He concluded that "the job duties of a `Size Supervisor' . . . do not exhibit any combination of occupational risk factors requisite to cause bilateral or unilateral CTS." Apprised of Mr. TS's report and conclusion, Dr. S, in a subsequent report, stated that "there is a degree of probability that the carpal tunnel did not result from work as a `Size Supervisor.'" He referred to his prior report of September 25, 1991, to state that "[T]he history of her work as a `mixer' however, does fit the causation for carpal tunnel. . . ."

Carrier argued below that Dr. S reports, the ergonomics report, and the language of claimant's own doctor's report (Dr. Z) that claimant's CTS was probably secondary to claimant's degenerative arthritis "possibly aggravated by work" showed that claimant failed to meet her burden of proof to establish by a preponderance of the evidence that on (date of injury), the discovery date, claimant had sustained a compensable CTS. The hearing officer obviously agreed with carrier's view of the evidence and determined that claimant had failed to prove that her CTS was caused by her employment duties.

Claimant contended at the hearing that her evidence established that her CTS occurred from her job-related injuries and stress. According to Dr. S's report of September 25, 1991, introduced by both parties, "high repetition, high stress or vibratory work . . . is considered the cause of [CTS] in the industrial setting as a cumulative trauma." The 1989 Act defines "repetitive trauma injury" as meaning "damage or harm to the physical structure of the body occurring as the result of repetitious, physically traumatic activities that occur over time and arise out of and in the course and scope of employment." Article 8308-1.03(39). Repetitive trauma injuries are included in the definition of "occupational disease." Article 8308-1.03(36) (1989 Act). These terms were similarly defined under the prior workers' compensation law (Article 8306, Section 20) and the kind of proof required to establish repetitive trauma injuries has been the subject both of Texas court decisions as well as decisions of this body.

The Texas courts have stated the element of causation in repetitive trauma cases as follows:

> To recover for an injury or disease of this type, one must not only prove that repetitious physical traumatic activities occurred on the job, but must also show that a causal link existed between the traumatic activity and the incapacity; that is, the disease must be inherent in the type of employment as compared with employment generally. (Citation omitted.)" Texas Employers Insurance Association v. Ramirez, 770 S.W.2d 896, 899 (Tex. App.-Corpus Christi 1989, writ denied); Davis v. Employers Insurance of Wausau, 694 S.W.2d 105, 107 (Tex. Civ. App.-Houston [14th Dist.] 1985, writ ref'd n.r.e.). *And see* Texas Workers' Compensation Commission Appeal No. 91026, decided October 8, 1991; Texas Workers' Compensation Commission Appeal No. 91113, decided January 27, 1992; Texas Workers' Compensation Commission Appeal No. 91118, decided January 31, 1992; and, Texas Workers' Compensation Commission Appeal No. 91124, decided February 12, 1992.

The hearing officer is the sole judge of the relevance and materiality of the evidence offered and of the weight and credibility to be given to the evidence. Article 8308-6.34(e) (1989 Act). The hearing officer determined that claimant failed to meet her burden of proof in establishing a compensable injury and we do not substitute our judgment when, as here, the challenged findings are supported by some evidence of probative value. Texas Employers' Insurance Association v. Alcantara, 764 S.W.2d 865, 868 (Tex. App.-Texarkana 1989, no writ). The hearing officer's findings and conclusions were not based upon insufficient evidence nor were they against the great weight and preponderance of the evidence. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision of the hearing officer is affirmed.

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Philip F. O'Neill
Appeals Judge

CONCUR:

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Joe Sebesta
Appeals Judge

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Robert W. Potts
Appeals Judge